

COMMONWEALTH OF VIRGINIA  
STATE AIR POLLUTION CONTROL BOARD  
REGULATIONS FOR THE CONTROL AND ABATEMENT OF AIR POLLUTION

PRELIMINARY DETERMINATION REVIEW DOCUMENT FOR  
PROPOSED REGULATION REVISION G97  
CONCERNING

EMISSION STANDARDS FOR TOXIC POLLUTANTS  
(9 VAC 5 CHAPTERS 40 AND 50)

**SUBJECT**

Emission Standards for Toxic Pollutants (Rules 4-3 and 5-3).

**REASON FOR PROPOSED REGULATION**

The regulation amendments are being proposed to render the state toxics program consistent with the federal Clean Air Act, according to a determination made pursuant to the review of existing regulations mandated by Executive Order 15(94).

**STATEMENT OF LEGAL AUTHORITY**

Section 10.1-1308 of the Virginia Air Pollution Control Law (Title 10.1, Chapter 13 of the Code of Virginia) authorizes the State Air Pollution Control Board to promulgate regulations abating, controlling and prohibiting air pollution in order to protect public health and welfare.

**STATEMENT OF STATUTORY MANDATES**

The regulations are not mandated by federal or state law or regulation. The regulations were adopted in order to implement the policy set forth in the Virginia Air Pollution Control Law. However, there is no specific requirement for the regulations.

**STATEMENT OF CONCLUSIONS**

The regulations are essential (i) to protect the health, safety or welfare of citizens or (ii) for the efficient and economical performance of an important governmental function. The reasoning for this conclusion is set forth below.

Analysis reveals that the regulations are consistent with applicable state, statutory provisions, and judicial decisions. However, factors and circumstances (federal statutes, original intent, state air quality program and air

pollution control methodology and technology) which justified the initial issuance of the regulations have changed to a degree that would justify a change to the basic requirements of the regulations.

Rules 4-3 and 5-3 were promulgated in 1985 to protect public health by setting significant ambient air concentration guidelines for all existing facilities emitting air toxic substances. At the time, the Clean Air Act authorized EPA to promulgate health-based emission standards for hazardous air pollutants (HAPs). However, due to the long-term nature of the decision-making process for this federal program, only a limited number of National Emissions Standards for Hazardous Air Pollutants (NESHAPs) had been promulgated. The process to establish a NESHAP was lengthy, similar to that used to determine a National Ambient Air Quality Standard for a criteria pollutant such as sulfur dioxide. The process involved a determination of a critical level that triggered significant health effects, followed by a determination of those industry categories that contributed the highest emission level of the HAP under review. Concurrent with the slow progression of federal assessment of HAPs, a series of significant chemical accidents were occurring worldwide, including one in Virginia (kepone incident in Hopewell). These circumstances led the State Air Pollution Control Board and policy-making groups in many other states to develop state-specific answers to the public health problems of HAPs. The states learned from federal experience that they needed a more expeditious process to assess and regulate HAPs than that used at the federal level. Many states, including Virginia, used occupational standards and extrapolated them for use in the ambient air.

By the late 1980s, the federal government realized that their approach to the evaluation and regulation of HAPs was not addressing the problem quickly enough. Instead of taking a health effects-based approach, the new 1990 Clean Air Act (the Act) addresses the problem through the initial establishment of control technology standards followed by a review to determine if the control technology standards sufficiently reduce public health risk. This approach addresses the problem quickly; all the control technology standards are to be established within the first ten years following the signing of the Act. First, the Act establishes a list of 189 critical HAPs. Then, emission standards that establish maximum acceptable control technology (MACT) are developed for source categories that emit these HAPs. Once the MACT standards are developed, the federal government must assess what risk to human health remains from sources subject to the MACT standards and must establish further standards for those source categories causing significant public health concerns.

The Act provides a more expeditious approach to protecting public health and welfare with regard to HAPs. States with their own programs must now decide how to integrate these programs with the federal program.

While the number of HAPs regulated at the federal level has increased under the Act, the state program is essential to protect the health of the citizens of the Commonwealth during the time that the federal program is being developed. Without an interim state program, there will be no assurance that public health will be protected. Depending on the pollutant, health risks even from a small exposure to a HAP can be high. In addition, public concern about HAPs has remained high since multiple accidental releases occurred in the U.S. and abroad in the 1970s and early 1980s. Data reported for certain industries under the requirements established by the Emergency Planning and Community Right to Know Act, or Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA Title III) has heightened public awareness and concern about public health and exposure to HAPs emissions in Virginia by alerting its citizens to the quantity of these emissions released in the state. The data reported under this program indicates that Virginia has significant air emissions of SARA Title III chemicals. In 1992, Virginia was ranked 16th in the nation for total releases of these chemicals; 94% of those releases were into the air. Virginia has made significant strides since the reporting under this program began in 1987. Virginia's air releases dropped 57% between 1987 and 1993, although some

of these reductions are attributable to reporting errors in the early years of the program. By providing a phase-out of the state program as the federal program gains strength, the environmental community will be assured that the state program provides adequate protection for public health until the federal program is fully implemented.

The regulations should be amended to provide that the state air toxics program will expire when the federal program for hazardous air pollutants (Title III of the federal Clean Air Act amendments of 1990) is implemented in its entirety. This recommendation is consistent with Recommendation 22 of the Governor's Commission on Government Reform to phase out the Virginia air toxics program as the federal air toxics program reaches maturity. In addition, the regulations should be amended to add language that explains the relationship between the state requirements for air toxics and the federal MACT requirements for hazardous air pollutants. By providing a phase-out of the state program as the federal program gains strength, the regulated community will be assured that the federal and state programs will not overlap. By providing additional language to make the federal and state program relationship clear, the regulated community will be assured of how these two different programs will work together. By making these changes, the environmental community will be assured that the state program provides adequate protection for public health until the federal program is fully implemented. There should be no increase or decrease in costs for either affected entities or the agency because the current policy of the State Air Pollution Control Board is to focus on the federal hazardous air pollutant list in its implementation of the air toxics rules.

The regulations should also be amended to limit applicability to the pollutants regulated under § 112 of the federal Clean Air Act as amended in 1990. This recommendation is consistent with Recommendation 22 of the Governor's Commission on Government Reform to limit the pollutants covered by the air toxics program. There should be no increase or decrease in costs for either affected entities or the agency because the current policy of the State Air Pollution Control Board is to focus on the federal hazardous air pollutant list in its implementation of the air toxics rules. In addition, the regulations should ensure that the department will retain the authority to review additional pollutants under limited circumstances, such as accidental releases or tire fires, and stipulate what those circumstances are. There should be no increase or decrease in costs for either affected entities or the agency because this authority currently exists in the regulations, although it is not specifically limited for special purposes.

## **STATEMENT OF PROCESS FOR CONSIDERING ALTERNATIVES**

Alternatives to the proposed regulation amendments are being considered by the department. The department has tentatively selected the second alternative as appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulation amendments. The alternatives being considered by the department are discussed below.

1. Take no action to amend the regulations. This option is not being selected because the current regulations do not explicitly make any provision for the relationship between the state program and the hazardous air pollutant program under § 112 of the Clean Air Act.
2. Make changes to the regulations. This option is being selected to allow the regulations to explicitly set out a relationship between the state requirements for air toxics and the federal requirements for hazardous air pollutants until the federal requirements are fully implemented.

3. Repeal the regulations in the absence of any legally binding state or federal mandates. This option is not being selected because the continuance of the regulations will provide an interim state approach to provide protection of public health until the federal mandates are fully implemented.

As provided in the public participation procedures of the State Air Pollution Control Board, the department will include, in the subsequent Notice of Intended Regulatory Action, a description of the above alternatives and a request for comments on other alternatives and the costs and benefits of the above alternatives or the other alternatives that the commenters may provide.

### **STATEMENT OF IMPACT ON FAMILY FORMATION, STABILITY AND AUTONOMY**

In the formulation of these regulation amendments, the department will consider the impact of the regulation amendments on family formation, stability and autonomy. It is not anticipated that these regulation amendments will have a direct impact on families. However, there may be positive indirect impacts in that the regulation amendments will lessen a regulatory burden and its attendant costs to taxpayers.

### **CONTACT PERSON**

Questions on the proposal should be referred to:

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